Supreme Court, U.S.
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80-328

No.

In The

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

against

ROGER BELTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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Question Presented

Did the New York Court of Appeals improperly conclude, contrary to well-established principles of law, that the jacket in the instant case was in the exclusive custody of the police, and therefore was not searched incidentally to a lawful arrest?

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays for a writ of certiorari to review the judgment and decree of the New York Court of Appeals in the case of People of the State of New York vs. Roger Belton. The judgment was entered on June 5, 1980.

Opinions and Orders Below

The opinion of the New York Court of Appeals is reported at 50 N.Y.2d 447 and appears in the Appendix hereto at A-2. The opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department is reported at 68 App. Div. 2d 198 and appears in the Appendix hereto at A-14.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1257(3). The judgment of the New York Court of Appeals was entered on June 5, 1980, reversing the affirmance of respondent's conviction by the New York Supreme Court, Appellate Division, Fourth Judicial Department.

STATEMENT

A. *Procedural History*

The defendant in this proceeding, and the respondent herein, Roger Belton, was indicted by the Ontario County, New York Grand Jury on a charge of criminal possession of a controlled substance in the fifth degree, a felony under section 220.09 of the New York Penal Law. Thereafter, the respondent moved for various forms of relief, including the suppression of the fruits of the search of the respondent's jacket as obtained in violation of his right to be free from unreasonable searches and seizures under the Fourth and Fourteenth Amendments to the United States Constitution. The motion was denied after a suppression hearing held pursuant to New York Criminal Procedure Law §710.60(4). The respondent subsequently pleaded guilty to a charge of attempted criminal possession of a controlled substance in the sixth degree, a felony under New York Penal Law §§220.06 and 110.00.

At the time of sentence, execution thereof was stayed by the Ontario County Court pending appeal, pursuant to New York Criminal Procedure Law §460.50, and the respondent's release on bail was continued. After granting an extension of time to perfect the appeal, the New York Supreme Court, Appellate Division, Fourth Judicial Department unanimously affirmed the conviction in a written opinion.

Further, permissive appeal was granted by the Hon. Matthew J. Jasen, Associate Judge of the New York Court of Appeals. After granting a motion for an extension of time to perfect the

appeal, the New York Court of Appeals reversed the lower court's affirmance of the conviction, and in a written opinion dismissed the indictment by a 5-2 vote.

B. *Factual Background*

There is little dispute as to the facts of the case. The respondent and three male companions were riding in an automobile being driven along the New York State Thurway when the car was stopped by State Trooper Nicot for speeding. Upon approaching the stopped vehicle, the Trooper smelled the odor of burning marihuana emanating from within the car through the driver's window. Noticing an envelope on the floor of the car commonly used for containing marihuana, the Trooper asked all four occupants to step out of the car, and, after patting each one down as he left the car arrested the four for unlawful possession of the marihuana. Having only one set of handcuffs, the officer did not place them on any of the four arrestees.

The Trooper then looked into the automobile and retrieved the envelope, which was stamped "Supergold," and found it to contain what appeared to be marihuana. He also observed what appeared to be partially burned marihuana cigarettes in the car's ashtrays.

Turning his attention to the vehicle's back seat, the officer found five jackets in the middle of the seat. In checking the pockets of each jacket, he discovered a quantity of what was determined to be cocaine and a medical insurance card in the name of the respondent in one of the jackets. As a result of the search, all four of the car's occupants, who were standing unsecured around the car, were placed under arrest for possession of the cocaine.

The Ontario County Grand Jury returned an indictment against the respondent for unlawful possession of cocaine, while directing that no charges be filed against his three companions. Prior to pleading guilty, the respondent challenged the search of

the car at a suppression hearing, his contention being that the search did not fall within any of the exceptions to the Fourth Amendment's warrant requirement. The People's theory was that the search was incidental to a lawful arrest, one of the established situations wherein a search warrant is not a requirement.

The trial court agreed that the search was permissible as incident to arrest, and the intermediate level appeals court unanimously affirmed. However, a divided New York Court of Appeals, patently misconstruing and unrealistically applying the purposes and parameters of the search incident exception, reversed the lower court's affirmance. It is this erroneous interpretation of a fundamental legal doctrine, clearly out of step with the application of this doctrine by other state and federal courts, that we urge should be reversed.

REASONS FOR GRANTING THE WRIT

1. The decision of the New York Court of Appeals conflicts with established interpretations of the search incident to arrest doctrine and with the decision of other state courts of last resort and of federal Courts of Appeals.

The court of trial jurisdiction in this case, Ontario County Court, New York, denied the respondent's motion to suppress the fruits of a search of the car in which he was riding. The court's ruling was predicated on the conclusion, after a hearing, that the respondent's jacket in the car had not been reduced to the exclusive control of the police officer at the time of the search, and that the search was proper as incident to a lawful arrest. The New York Court of Appeals, by a divided vote, reversed the intermediate level appellate court's unanimous affirmance of this ruling, holding that the jacket was within the exclusive control of the police officer, and that the search was therefore not permissible.

We urge that this conclusion by the New York Court of Appeals was patently erroneous under the United States Supreme Court's decision in *Chimel v. California*, 395 U.S. 752 (1969), and in complete disharmony with the decisions of federal Courts of Appeals and state courts of last resort that have been confronted by similar factual situations. Because of the patent conflict between the New York State judiciary's approach to searches contended to be incidental to lawful arrests, and the approach of virtually all other state and federal appeals courts, it has become extremely difficult to intelligently advise law enforcement officers as to the lawful limits of their actions when confronted with factual situations similar to that in the present case. This case is appropriate for this Court's consideration of the principles contained herein, under well-accepted guidelines of long standing. Conflicts on federal questions between decisions of federal Courts of Appeals and of the highest state courts have been held to justify Supreme Court review. See e.g., *Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394, 398 (1947). Similarly, conflicting interpretations of federal questions by the highest courts of two or more states have likewise been held to warrant the Supreme Court's acceptance of such cases for review. See, e.g., *United States v. Oregon*, 366 U.S. 643, 645 (1961). Consequently, we ask this Court to exercise its discretionary power to hear this case.

Any examination of the legality of the conduct of the police officer in this case, New York State Trooper Nicot, must begin with a reference to *Chimel v. California, supra*, wherein the Supreme Court stated that when an arrest is made, it is reasonable for the arresting officer to search, for weapons or destructable evidence, the person arrested and the area " 'within his immediate control' — construing that phrase to mean the area from which he might gain possession of a weapon or destructable evidence." 395 U.S. at 763. "The authority to search the person incident to a lawful custodial arrest . . . does not

depend upon what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *United States v. Robinson*, 414 U.S. 218, 235 (1973).

The Supreme Court expounded upon the concept of "immediate control" in *United States v. Chadwick*, 433 U.S. 1 (1977), stating that "(o)nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15. It is against these principles that Trooper Nicot's actions must be measured.

Obviously, the critical factor in this case is whether the respondent's jacket, searched by Trooper Nicot at the scene of the arrest, was within the "immediate" or "exclusive" control of the Trooper at the time of the search. It is the People's position that the jacket had not come within Trooper Nicot's exclusive control, but rather that, as noted in the dissenting opinion in the New York Court of Appeals, "(t)he situation was still fluid." *New York v. Belton*, 50 N.Y. 2d 447, 454 (1980) (Gabrielli, J., dissenting). The Trooper had made an arrest of the four occupants of a speeding car based on probable cause, and having only one pair of handcuffs, he lacked the capability to secure the four. The defendants were all outside standing at various points around the car. It would have been eminently possible and plausible for one or more of the four to lunge inside the car to grab a weapon or destroy evidence. This is the classic situation envisioned in the *Chimel* decision and its progeny in which a search of the car and its contents would be completely justified. In fact, a review of federal and state court decisions concerning cases with similar fact patterns reveals no authority for reversing the present conviction.

For example, among the federal courts, warrantless searches were upheld as incident to arrest in the following cases. A search of a jacket on the front seat of a car was proper where two suspects were outside the car and one was seated in the car, amid five police officers in *United States v. Wilkerson*, 598 F. 2d 621 (D.C. Cir., 1978). The seizure of contraband on the floor of a car which a defendant had just left or was in the process of leaving was held proper in *United States v. Agostino*, 608 F. 2d 1035 (5th Cir., 1979). In another case, a police officer grabbed a bag from between the seats of a car which was surrounded by four males smoking marihuana. The search was held proper. *United States v. Foster*, 584 F. 2d 997 (D.C. Cir., 1978). Many other decisions are also probative of this issue, such as *United States v. Campbell*, 575 F. 2d 505 (5th Cir., 1978); *United States v. Garcia*, 605 F. 2d 349 (7th Cir., 1979); and *United States v. Ajloujny*, 476 F. Supp. 995 (E.D. N.Y., 1979). Those cases *rejecting* search incident arguments generally find that the object searched was within the exclusive control of the arresting officers where the defendant is outnumbered by police and handcuffed. See, e.g., *United States v. Neumann*, 585 F. 2d 355 (8th Cir., 1978) and *United States v. Schleis*, 582 F. 2d 1166 (8th Cir., 1978).

State courts have also generally applied the principles relative to searches incident to arrest uniformly and in a fashion that would sustain the search in the present case. For example, in two separate cases a search of a car was upheld as incident to arrest where each arrestee was near the car, with his hands placed on the car's roof. *North Carolina v. Hunter*, 261 S.E. 2d 189 (1980); *Louisiana v. Wilkens*, 364 So. 2d 934 (1978). And again, searches of cars and their contents have generally been ruled impermissible when the arrestee is handcuffed or otherwise well secured by a greater number of police. See, e.g., *Louisiana v. Blanchard*, 374 So. 2d 1248 (1979); *Montana v. Cripps*, 582 P. 2d 312 (1978).

A review of the facts of this case, particularly in light of the manner in which other jurisdictions have approached and decided questions such as this, must lead to the inescapable conclusion that State Trooper Nicot acted in an entirely appropriate fashion, considering the circumstances. He could not immobilize all four defendants. Assistance had not yet arrived at the scene. He had the right and duty to make certain that his safety wasn't threatened by the four men whom he had just arrested, and that any evidence secreted in the defendant's car was not destroyed. The fact that the New York Court of Appeals has held otherwise causes acute difficulties in advising police officers as to the limit of their legal authority under such circumstances. We prefer to believe that a more considered approach to this case, in light of established constitutional principles, would yield the conclusion that the search was necessary and proper. As the dissenting opinion in the decision below stated: "Apparently the majority believes that since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his life upon the validity of such a questionable presumption." *New York v. Belton, supra,* at 454, 455. (Gabrielli, J., dissenting). The dissent was from a decision in complete disharmony, in its interpretation of an important Constitutional doctrine, with that of New York's sister states and of the federal courts.

CONCLUSION

For the foregoing reasons, we respectfully ask that a writ of certiorari issue to review the judgment and decision of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX

ORDER OF THE NEW YORK COURT OF APPEALS

Remittitur

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Lawrence H. Cooke, Chief Judge, Presiding

4 No. 208

The People &c.,

Respondent,

v.

Roger Belton,

Appellant.

The appellant in the above entitled appeal appeared by Lipsitz, Green, Fahringer, Roll, Schuller & James; *the respondent appeared by* James R. Harvey.

The Court, after due deliberation, orders and adjudges that the order is reversed, motion to suppress granted and indictment dismissed. Opinion by Cooke, Ch.J. All concur except Gabrielli, J., who dissents and votes to affirm in an opinion in which Jasen, J., concurs.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Ontario County, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 5, 1980.

OPINION OF THE NEW YORK COURT OF APPEALS

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Argued April 21, 1980; decided June 5, 1980

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered May 22, 1979, which affirmed a judgment of the Ontario County Court (Harold Stiles, J.), convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point, the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana. After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then re-entered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification. Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division affirmed, holding that the warrantless search of the jacket was lawful as incident to defendant's arrest for possession of marihuana.

Opinion of the New York Court of Appeals

The Court of Appeals reversed, granted the motion to suppress and dismissed the indictment, holding, in an opinion by Chief Judge Cooke, that, following a lawful arrest, the privacy interest of the arrestee in an article remains intact once he is effectively neutralized or the article is within the exclusive control of the police, at which point any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer incident to the arrest.

HEADNOTE

Crimes — Unlawful Search and Seizure

A custodial arrest of a suspect based upon probable cause without a warrant in a public place constitutes a reasonable intrusion on the individual's right to privacy under the Fourth Amendment to the United States Constitution and, that arrest being a lawful and substantial intrusion, any search incident thereto requires no additional justification; moreover, since there is always present the danger that the arrestee may seek to use a weapon to effect an escape or destroy or conceal evidence of a crime, to safeguard himself and others, and to prevent the loss of critical evidence, it is reasonable from a Fourth Amendment perspective for the arresting officer to conduct a prompt, warrantless search of the arrestee's person and the area within his immediate control, i.e., the area from within which he might gain possession of a weapon or destructible evidence. However, a warrantless search of the zippered pockets of a jacket found in the back seat of the car in which defendant was traveling when he was stopped by police, ordered to leave the car and arrested on probable cause, may not be upheld as a search incident to a lawful arrest where there was no longer any danger that the arrestee or a confederate might gain access to the article at the time of the search; the critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and the search.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

68 Am Jur 2d, Searches and Seizures §§92, 93, 96, 102

8 Am Jur Pl & Pr Forms (Rev), Criminal Procedure, Form 176; 22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 85-88

13 Am Jur Proof of Facts 391, Criminal Drug Addiction and Possession

5 Am Jur Trials 331, Excluding Illegally Obtained Evidence; 8 Am Jur Trials 573, Defense of Narcotics Cases

*By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Paul J. Cambria, Jr., and *Barbara Davies Eberl* for appellant. The warrantless search of appellant's zippered jacket in the absence of exigent circumstances while it was within the exclusive control of the police, and the seizure of contraband from its recesses violates the Fourth and Fourteenth Amendments and requires that the evidence be suppressed and the indictment dismissed. *(Arkansas v Sanders*, 442 US 753; *United States v Chadwick*, 433 US 1; *Coolidge v New Hampshire*, 403 US 443; *People v De Santis*, 46 NY2d 82; *People v Perel*, 34 NY2d 462; *People v Cofield*, 55 AD2d 113, 43 NY2d 654; *United States v Johnson*, 588 F2d 147; *United States v Schleis*, 582 F2d 1166; *Chimel v California*, 395 US 752; *United States v Stevie*, 582 F2d 1175.)

James R. Harvey, District Attorney (R. Michael Tantillo of counsel), for respondent. The warrantless search of the vehicle and of appellant's jacket therein was not violative of the Fourth and Fourteenth Amendments in that the search was properly incident to a lawful arrest. *(Chimel v California*, 395 US 752; *United States v Robinson*, 414 US 218; *People v Weintraub*, 35

NY2d 351; *People v De Santis*, 46 NY2d 82; *United States v Chadwick*, 433 US 1; *United States v Garcia*, 605 F2d 349; *People v Cofield*, 55 AD2d 113, 43 NY2d 654; *Arkansas v Sanders*, 442 US 753; *Chambers v Maroney*, 399 US 42; *Carroll v United States*, 267 US 132.)

OPINION OF THE COURT

Chief Judge Cooke.

A warrantless search of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.

On April 9, 1978, defendant and three companions were traveling on the New York State Thruway in Ontario County when their car was stopped by a State trooper for speeding. Upon approaching the vehicle, the officer smelled the distinct odor of marihuana emanating from within and observed on the floor an envelope which he recognized as a type that is commonly used to sell the substance. At that point the officer ordered the occupants out of the vehicle, patted each down, removed the envelope from the floor and ascertained that it contained a small amount of marihuana.

After the marihuana was found, the individuals, still standing outside the car, were placed under arrest. The officer then reentered the vehicle, searched the passenger compartment and seized the marihuana cigarette butts lying in the ashtrays. He also rifled through the pockets of five jackets on the back seat. Upon opening the zippered pocket of one of them, he discovered a small amount of cocaine and defendant's identification.

Following denial of his motion to suppress the cocaine, defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree. A unanimous Appellate Division

affirmed, holding the warrantless search of the jacket lawful as incident to defendant's arrest for possession of marihuana (68 AD2d 198). There should be a reversal.

Analysis begins with the general proposition that, except in a few narrowly circumscribed instances, the Fourth Amendment condemns warrantless searches and seizures as unreasonable *(Coolidge v New Hampshire,* 403 US 443, 455). The privacy interest of our citizens is far too cherished a right to be entrusted to the discretion of the officer in the field. Reasonableness of the intrusion does not turn upon the belief, however well founded it may be, that the article sought is concealed in a particular place. The Constitution, therefore, focuses upon the desirability of having the judiciary, rather than the police, determine when searches and seizures are permissible and the limitations that are to be placed upon such activities. Necessarily, then, the predicate for the warrantless search must be carefully examined to ensure that its scope, both temporally and geographically, did not exceed constitutional limits.

The People maintain that the warrantless search of defendant's jacket was reasonable on the ground that it was incident to his lawful arrest. A custodial arrest of a suspect based upon probable cause without a warrant in a public place constitutes a reasonable intrusion under the Fourth Amendment *(United States v Watson,* 423 US 411). That arrest being a lawful and substantial intrusion, any search incident thereto requires no additional justification *(People v Perel,* 34 NY2d 462; see, also, *People v Weintraub,* 35 NY2d 351).

When a suspect is placed under custodial arrest, there is always present the danger that he may seek to use a weapon to effect an escape or destroy or conceal evidence of a crime. Thus, to safeguard himself and others, and to prevent the loss of critical evidence, it is reasonable from a Fourth Amendment perspective for the arresting officer to conduct a prompt,

warrantless "search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence" *(Chimel v California,* 395 US 752, 763). Upon arrest, the privacy interest of the arrestee in possessions within the arrestee's immediate control are subsumed within the State's interest in discovering weapons, thwarting access to means of escape and preventing the destruction of evidence (see *United States v Robinson,* 414 US 218). But while the arrest establishes the authority for the warrantless search, it does not transform the initial predicate into carte blanche justification to rummage through all articles which might bear some connection to the arrestee (see *Dyke v Taylor Implement Co.,* 391 US 216; People v Williams, 37 NY2d 206; *People v Lewis,* 26 NY2d 547).

The privacy interest of the arrestee in an object remains intact once he is effectively neutralized or the object is within the exclusive control of the police (see *Arkansas v Sanders,* 442 US 753; *United States v Chadwick,* 433 US 1). At that point, any exigency which would otherwise have justified a warrantless search has been dissipated and the search is no longer an incident to the arrest (but cf. *People v De Santis,* 46 NY2d 82; *People v Darden,* 34 NY2d 177).[1] The critical inquiry focuses upon the extent to which the arrestee may gain access to the property rather than the time or space between the arrest and search (see *United States v Edwards,* 415 US 800).

In this regard, *United States v Chadwick* (433 US 1, *supra*) is instructive. There, railroad officials in San Diego observed two individuals loading a heavy footlocker onto a train bound for Boston. Their suspicions were aroused when the trunk leaked talcum powder, a substance commonly used to mask the odor of

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[1]To the extent that these cases may be read to suggest otherwise, they are disapproved.

marihuana. The officials notified Federal agents who relayed the information to their counterparts in Boston. When the train arrived in that city, the two individuals who had loaded the footlocker in San Diego were on hand and lifted it into the trunk of Chadwick's waiting car. At that point, Federal agents arrested all three, seized the footlocker and transported them to the Federal building. There, with the arrestees safely incarcerated, the agents opened the trunk and seized a large quantity of marihuana. In holding the search unlawful, the court rejected the notion that it was incidental to Chadwick's arrest. Said the Court: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" (433 US, at p 15; see, also, *Arkansas v Sanders*, 442 US 753, *supra*).

That defendant retained an expectation of privacy in the contents of his jacket pockets notwithstanding the fact of his arrest is beyond dispute. Indeed, it is difficult to imagine a more private receptacle where one might place one's most personal items than the zippered recesses of a jacket. Defendant's arrest, standing alone, did not vitiate that privacy interest by being converted into a license for law enforcement authorities to engage in a warrantless search of unlimited temporal and geographic scope. Once defendant had been removed from the automobile and placed under arrest, a search of the interiors of a private receptacle safely within the exclusive custody and control of the police may not be upheld as incident to his arrest (*United States v Chadwick*, 433 US 1, *supra*; *Arkansas v Sanders*, 442 US 753, *supra*). The car was in a secure place where it could have been easily guarded, its occupants under arrest and safely away from the vehicle, their removal to the police station im-

minent.[2] There was, therefore, no reason why the search should not have awaited the issuance of a warrant.

Accordingly, the order of the Appellate Division should be reversed, the motion to suppress granted and the indictment dismissed.

Gabrielli, J. (dissenting). I respectfully dissent. Although I am in agreement with the standard legal principles enunciated by the majority, I cannot concur in what appears to be an obvious misapplication of those principles to the facts of this case.

A warrantless search based on probable cause is permissible if the facts underlying the search bring it within any of several narrow exceptions to the warrant requirement with which this court is fully familiar. One such exception to the warrant requirement is a search incident to a lawful arrest. Although this particular exception has had a somewhat uncertain history (compare *Trupiano v United States*, 334 US 699, with *United States v Rabinowitz*, 339 US 56), it is now well settled and cannot be disputed that a police officer making a valid arrest may legitimately engage in a limited search of both the person of the arrestee and "the area from within which he might gain possession of a weapon or destructible evidence" (*Chimel v California*, 395 US 752, 763) without first obtaining a search warrant. Moreover, although the general rationale for permitting warrantless searches under certain circumstances is the need to allow a police officer sufficient flexibility to protect

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[2]One searches the record in vain for support of the dissenter's claim that at the time of arrest—the point from which the predicate for the warrantless search is measured—"the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer" (dissenting opn, p 454). Indeed, the facts, as found at the suppression hearing and affirmed by the Appellate Division, were to the effect that the jacket was searched after the defendant was removed from the vehicle and then placed under arrest.

himself from possible danger and to prevent the destruction of evidence (see, generally, *Arkansas v Sanders*, 442 US 753, 759), a warrantless search incident to a lawful arrest may be made "whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence" *(United States v Chadwick*, 433 US 1, 14).

To be sure, such a search is subject, as it should be, to careful judiciary scrutiny before its fruits may be admitted into evidence. As the Supreme Court has recently stated, "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest' * * * or no exigency exists. Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest" *(United States v Chadwick, supra*, at p 15). While these principles are readily articulated, their application to individual cases may seem, at first blush, to be a task of some complexity. This is so in large part because each case must turn upon its peculiar facts and "an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights" *(Arkansas v Sanders*, 442 US 753, 757, *supra)*. This observation is particularly apt when applied to a case such as this, in which all members of the court are agreed that the validity of the challenged search turns upon the degree to which the defendant and his property had come within the exclusive control of the police at the time of the search. Clearly, we are here presented with a valid arrest based upon probable cause. This is, as it must be, conceded by all. Moreover, there exists no dispute but that the officer's search of the persons of the defendant and his companions and the initial

search of the car for contraband were entirely proper. The only issue that divides this court, then, is whether the officer acted illegally by extending his search to include the pockets of the jackets thrown on the back seat of the automobile. The courts below, which by law, unlike this court, are empowered to resolve disputes of fact, have concluded that the jackets were within reach of the four suspects and had not yet been reduced to the exclusive control of the officer. I find no justification for disturbing this essentially factual determination and, based upon this finding, the conclusion that the search was incidental to a lawful arrest cannot be avoided.

Certainly there exists sufficient evidence in the record before us to support the factual findings made by the courts below. Indeed, this case is illustrative of the type of situation in which a warrantless search is most appropriate. We are not here faced with an extended search of a defendant's property after the defendant has been completely subdued and all actual danger has passed. Rather, this search was conducted by a lone peace officer who was in the process of arresting four unknown individuals whom he had stopped in a speeding car owned by none of them and apparently containing an uncertain quantity of a controlled substance. The suspects were standing by the side of the car as the officer gave it a quick check to confirm his suspicions before attempting to transport them to police headquarters or radioing for assistance. The situation was still fluid, and neither the suspects themselves nor their property had as yet been reduced to the exclusive and certain control of the police. I cannot agree that under these circumstances the officer acted improperly in searching the jackets found on the back seat of the automobile. The potential for danger to the officer or for the destruction of evidence is patent, and thus the search must be deemed incidental to the arrest.

I must confess that I am somewhat puzzled by the rationale adopted by the majority of this court today, for it appears rather

ingenuous. Instead of undertaking that careful factual analysis of the realities underlying the continuing encounter between the lone officer and the four suspects which is so necessary to fairly judge the reasonableness of the officer's actions, the court premises its decision completely upon an uncertain assumption drawn from two isolated facts. Apparently the majority believes that since the suspects were standing outside the car at the time of the search and had been told that they were under arrest, both their persons and their property had thereby been conclusively and safely reduced to the complete control of the officer, as a matter of law. Although one might well wish that all criminal suspects could so readily be subdued as a matter of law, I cannot agree with a decision that requires a police officer to stake his very life upon the validity of such a questionable presumption.

Accordingly, I vote to affirm the order appealed from.

Judges Jones, Wachtler, Fuchsberg and Meyer concur with Chief Judge Cooke; Judge Gabrielli dissents and votes to affirm in a separate opinion in which Judge Jasen concurs.

Order reversed, etc.

ORDER OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: DILLON, P.J., CARDAMONE, SCHNEPP, DOERR, MOULE, JJ.

People of the State of New York,

Respondent,

vs.

Roger Belton,

Appellant.

The above named Roger Belton, defendant in this action, having appealed to this Court from a judgment of the Ontario County Court, entered in the Ontario County Clerk's office on September 29, 1978 and said appeal having been argued by Paul Cambria of counsel for appellant, Timothy Buckley of counsel for respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be, and the same hereby is unanimously affirmed.

Opinion by Moule, J., which is hereby made a part hereof.

Entered: May 22, 1979

MARY F. ZOLLER, *Clerk*

OPINION OF THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH DEPARTMENT

The People of the State of New York, Respondent, v Roger Belton, Appellant.

Fourth Department, May 22, 1979

SUMMARY

Appeal from a judgment of the Ontario County Court (Harold Stiles, J.), rendered September 29, 1978, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the sixth degree.

HEADNOTE

Crimes — Unlawful Search and Seizure — Warrantless Search Incident to Arrest

It was not error for the trial court to fail to suppress cocaine found in defendant's jacket which was searched without a warrant in the rear seat of an automobile from which defendant had exited in order to be arrested for possession of marihuana after the car in which defendant was traveling was observed traveling 75 miles per hour and the arresting officer smelled the odor of marihuana coming from within the automobile and observed an envelope on the floor of the automobile of a type commonly used to sell marihuana, since the search was incident to arrest; upon a lawful arrest, a search may be made of the person of the arrestee and of the area within the arrestee's control, which area includes those personal effects of the arrestee that are "ready to hand".

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

68 Am Jur 2d, Searches and Seizures §§36, 96
22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Forms 71 et seq.

ANNOTATION REFERENCE

Modern status of rule as to validity of nonconsensual search and seizure made without warrant after lawful arrest as affected by lapse of time between, or difference in places of, arrest and search. 19 ALR3d 727.

*By the Publisher's Editorial Staff.

APPEARANCES OF COUNSEL

Lipsitz, Green, Fahringer, Roll, Schuller & James (Paul J. Cambria, Jr., of counsel), for appellant.

James R. Harvey, District Attorney (Timothy Buckley of counsel), for respondent.

OPINION OF THE COURT

On this appeal defendant contends that the trial court erred in denying his motion to suppress cocaine found in his jacket which was searched without a warrant in the rear seat of an automobile from which defendant had exited in order to be arrested for possession of marihuana. On April 9, 1978 a State Police officer observed an automobile with four passengers traveling 75 miles per hour on the New York State Thruway. Upon stopping the auto and questioning the driver, the officer smelled the odor of marihuana coming from within the auto and observed on the floor of the auto an envelope stamped "Supergold" which he recognized as a type of envelope that is

commonly used to sell marihuana. The officer ordered the occupants from the auto and patted each down. He then removed the "Supergold" envelope from the auto and, when he found that it contained traces of marihuana, he arrested the four for possession of marihuana, read them their rights and searched them. The officer then searched the passenger compartment of the auto and seized marihuana cigarette butts which he observed in the ashtrays. He also searched five jackets that he found in the back seat and, in one of them, he found cocaine and defendant's identification. The officer then arrested the four for possession of cocaine.

On May 24, 1978 the Ontario County Grand Jury indicted defendant for criminal possession of a controlled substance in the fifth degree. Defendant pleaded guilty to attempted possession of a criminal substance in the sixth degree following the Ontario County Court's denial of his motion to suppress the cocaine.

Defendant contends that the warrantless search of his jacket violated his constitutional rights. The cornerstone of any Fourth Amendment inquiry is reasonableness and a warrantless search must come within one of the "specifically established and well-delineated exceptions" to the warrant requirement *(Katz v United States,* 389 US 347, 357). The exceptions are (1) a consensual search; (2) seizure of evidence and contraband in plain view; (3) search and seizure incidental to a lawful arrest; (4) search and seizure based upon probable cause, and, applicable to automobile searches; (5) a search in exigent circumstances where there exists probable cause *(People v Mahoney,* 60 AD2d 107, 109-110). Inasmuch as defendant does not challenge the lawfulness of either the initial stop or the arrest for possession of marihuana, the narrow question on this appeal is whether the search of defendant's jacket in the back seat of the vehicle can be justified under one of the above exceptions.

Opinion of the New York Supreme Court, Appellate Division, Fourth Department

The People contend that the search was justified as a search incident to arrest and we agree. Upon a lawful arrest, a search may be made of the person of the arrestee and of the area within the arrestee's control *(United States v Robinson,* 414 US 218, 224; *Chimel v California,* 395 US 752, 763). This area includes those personal effects of the arrestee that are "ready to hand" *(People v Weintraub,* 35 NY2d 351, 354). Warrantless searches incident to arrest are justified by the officer's need to find weapons and easily destructible evidence within the arrestee's immediate area *(United States v Robinson, supra; Chimel v California, supra).* Such searches are also allowed so that an officer can discover the fruits of the crime, the instrumentalities used to commit the crime and contraband *(People v Lewis,* 26 NY2d 547, 550-551).

Defendant contends that *United States v Chadwick* (433 US 1) mandates suppression of the cocaine. In that case the United States Supreme Court held unreasonable as a search incident to arrest the search of a footlocker seized from an automobile upon the defendant's arrest and searched one and one-half hours later at a police station. In *People v De Santis* (46 NY2d 82) the Court of Appeals interpreted *Chadwick* narrowly and allowed, as a search incident to arrest, the search of a suitcase in defendant's possession at the time of arrest. The court found the search reasonable because it had a close nexus to the time and place of the arrest *(People v De Santis, supra).* The court noted that "the practical impetus for allowing these searches lies in the fact that the arrest itself constitutes such a major intrusion into the privacy of the individual that the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality *de minimis" (People v De Santis, supra,* p 87, citing *People v Perel,* 34 NY2d 462, 467-468; see, also, *United States v Ochs,* 595 F2d 1247).

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In *People v Cofield* (55 AD2d 113, affd 43 NY2d 654), the First Department found reasonable as a search incident to arrest the search of a paper bag within a satchel on the back seat of defendant's auto while defendant stood outside the auto. Also, in *People v Abramowitz* (58 AD2d 921), the Third Department allowed as a search incident to arrest the search of a leather bag behind the driver's seat of a vehicle after the driver had been arrested for driving while impaired and after pills were found during a search of his person (see, also, *People v Sauger*, 58 AD2d 919; *People v Mangan*, 55 AD2d 247, 249).

The officer's search of defendant's jacket which he found in the vehicle did not exceed constitutional limits. The search was reasonable in scope, intensity and duration. Once defendant was validly arrested for possession of marihuana, the officer was justified in searching the immediate area for other contraband.

The judgment should be affirmed.

Dillon, P.J., Cardamone, Schnepp and Doerr, JJ., concur.

Judgment unanimously affirmed.